Supreme Court, U. S.
FILED
AUG 15 1975
MICHAEL RODAK, JR., CLERK

No. 75-244

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES BRAVERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Charles Braverman, respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on June 16, 1975.

OPINION BELOW

The opinion and order of the Court of Appeals, not yet reported, appears as Appendix A hereto. The unpublished memorandum opinion and order of the District Court for the Northern District of Illinois appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 16, 1975. A timely petition for rehearing *en banc* was denied on July 16, 1975, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the "reasonably foreseeable" test, as applied by the Court of Appeals for the Seventh Circuit as the measure of an individual's liability in conspiracy, is consistent with prior decisions of this Court holding that to support a conspiracy charge, the defendant's knowledge of the conspiracy must be clearly and unequivocally proven.

2. Whether the "reasonably foreseeable" test, as applied in this case, impermissibly withdraws the vital factual issue of knowledge of the conspiracy from the jury.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

United States Code, Title 18:

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

United States Code, Title 18:

§ 656. *Theft, embezzlement, or misapplication by bank officer or employee*

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall

be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

United States Code, Title 18:

§ 1005. *Bank entries, reports and transactions*

• • •

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; and "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

United States Code, Title 18:

§ 1014. *Loan and credit applications generally; renewals and discounts; crop insurance*

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131 to 1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years or both.

STATEMENT OF THE CASE

Petitioner Charles Braverman, together with Stanley Johnson, the president of the Steel City National Bank of Chicago, Charles Helm, the bank's vice president and Robert Ness, was indicted in a six count indictment charging violations of 18 U.S.C. §§ 2, 371, 656, 1005 and 1014. Neither petitioner nor Ness was affiliated with the bank. As to petitioner, the indictment charged as follows:

(a) Count 1 charged that petitioner conspired with Johnson, Helm and Ness to commit three federal offenses: the willful misapplication of bank funds (18 U.S.C. § 656), the making of false entries in the books and records of the bank (18 U.S.C. § 1005) and the submission of false statements to the bank to influence its actions (18 U.S.C. § 1014).

(b) Count 2 charged that in connection with a $30,000 loan in April, 1971, petitioner aided and abetted Johnson in the willful misapplication of bank funds (18 U.S.C. §656), thus violating 18 U.S.C. § 2;

(c) Count 3 charged that in connection with a $20,000 loan in December, 1971, petitioner aided and abetted Johnson in the violation of 18 U.S.C. § 656, thus violating 18 U.S.C. § 2;

(d) Count 4 charged that in connection with the April, 1971 loan referred to in Count 2, petitioner aided and abetted Johnson in making false entries in the bank's Interview and Memorandum Sheet with regard to the purpose of the loan (18 U.S.C. §1005), in violation of 18 U.S.C. § 2;

(e) Count 5 charged that in connection with the December, 1971 loan referred to in Count 3, petitioner aided and abetted Johnson in the violation of 18 U.S.C. §1005, thus violating 18 U.S.C. § 2;

(f) Count 6 charged that petitioner, aided and abetted by Ness, made false statements in a personal statement submitted to the bank in order to obtain two loans, in violation of 18 U.S.C. § 1014.

Ness, Johnson and Helm, at the time the loan transactions forming the basis for the indictment took place, were involved in a massive loan-kiting and embezzlement scheme which eventuated in 29 indictments, each charging, in essence, that Ness, with the assistance of some other individual who had agreed to help him obtain a loan, submitted false documents to the bank and, with the complicity of Johnson and Helm, obtained the loan.

Ness, Johnson and Helm pleaded guilty to other indictments and petitioner's indictment was dismissed as to them. Petitioner was tried alone. Ness was the government's chief witness. Neither Johnson nor Helm testified.

Ness testified that petitioner, a friend of his, at Ness' urging, agreed to take out a loan on Ness' behalf pursuant to Ness' representation that he was in financial difficulty. Ness testified that petitioner had been reluctant to obligate himself for Ness, fearing that his wife would be angry, but agreed to assist Ness when Ness suggested that petitioner use an assumed name and a borrowed address, thus preventing his wife from learning of the loan. Ness completed a financial statement, signed by petitioner in blank using the name "Weis," and obtained a loan. Ness testified that petitioner received none of the loan proceeds for his personal use, never went to the bank and never met nor spoke to the bank officers. (Tr. 102-114, 224-230, 252-253, 285-286, 292.)* Approximately six months later, Ness

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* "Tr." refers to the page of the transcript. "App." refers to the printed appendix to this brief.

asked petitioner if he would take out an additional loan. When he refused, Ness obtained the additional loan with a note petitioner had previously signed for renewal purposes. (Tr. 158, 160, 317-318.)*

As proof of the bank officers' complicity, a necessary element of the aiding and abetting and conspiracy charges, Ness testified to conversations he had with Johnson relating to their ongoing relationship and to Ness' need for Johnson's approval of the "Weis" loan in order to meet payments due on other Ness loans Johnson had approved; Ness further testified concerning conversations he had with Johnson relating to the fabrication of information for bank records. He testified that he did not tell petitioner of these conversations and that it was his belief that petitioner would not have assisted him had petitioner been aware of the illegal dimensions of Ness' activities. Further, Ness stated that when the FBI began its investigation of Ness' transactions at the bank, Ness called petitioner, told him that there was an investigation of various loans in which Ness was involved at the Steel City Bank in progress and that the less petitioner knew about Ness' involvement at the bank, the better off he would be. (Tr. 102, 122-132, 141-143, 237-238, 274-278, 284, 174, 335-336.)

The trial judge reserved ruling on petitioner's motions for judgment of acquittal made at the close of the government's case and at the close of all the evidence. The jury was instructed, as to the accessory counts, that to be guilty, petitioner must have knowledge of the bank officers' commission of the relevant offenses. The jury was instructed, as to the conspiracy count, that they could find petitioner guilty if they found that he entered into a conspiracy to commit *any one* of the three objects of the conspiracy charged.* Petitioner was found guilty on all six counts.

* This paragraph is not intended to summarize all the evidence but simply the testimony relating to the obtaining of the two loans.

After verdict, the trial judge granted the motion for judgment of acquittal as to the four accessory counts, finding that it was not necessary to petitioner's agreement with Ness to obtain a loan that a bank officer would be criminally involved, and that there was not sufficient evidence from which the jury could conclude beyond a reasonable doubt that petitioner had specific intent to aid in, or specific knowledge of, the crimes with which the bank officers were charged. The trial judge upheld the jury's verdict as to the conspiracy count, apparently reasoning that since there was *prima facie* proof that petitioner agreed to obtain a loan under fraudulent circumstances, and the loan was, in fact, obtained by means of a bank officer's complicity, the conspiracy was adequately proven. (App. B, pp. 16-18.)

Petitioner appealed from the jury verdict on the conspiracy count and the substantive §1014 count, and the Court of Appeals affirmed. In so doing, the Court made a finding that "Braverman could reasonably foresee the necessity of the criminal involvement of bank officials." (App. A, p. 8.) It is the propriety of the Seventh Circuit's use of that standard which petitioner respectfully asks this Court to review.

* The trial court's charge on conspiracy and aiding and abetting is appended as Appendix C hereto. The "one object" portion of the charge is at App. C, p. 19.)

REASONS FOR GRANTING THE WRIT

This case involves a critically important, constantly recurring issue of federal conspiracy law which has never been expressly decided by this Court: the standard of proof to be applied in determining the scope of a particular defendant's conspiratorial agreement when a substantial question exists as to his knowledge of some of the criminal dimensions of the conspiracy alleged. The question has arisen in the trial of a single defendant and demonstrates clearly that the confusion experienced in the trial of conspiracy cases is due as much to ambiguous language and vague standards in the law as it is to the problems created by multiple defendants.

Petitioner submits that this confusion of standards has led the trial court and the Court of Appeals, both applying different tests of liability, to affirm his conviction of membership in a conspiracy vastly different in nature from anything of which he was shown to be aware. He further respectfully submits that this Court's clarification of the standards governing this difficult area of the law is desperately needed to protect the rights of those accused of conspiracy and to set forth, for all those involved in the trial of conspiracy cases, fair, ascertainable standards of guilt.

1. The Decision Below, Holding That A "Reasonably Foreseeable" Test Can Be Applied to This Case As the Measure of Petitioner's Liability in Conspiracy Conflicts with Prior Decisions of This Court Holding That There Must Be Clear, Unequivocal Proof of Knowledge of the Conspiracy Alleged To Support A Finding of Guilt of That Charge.

Petitioner was charged with membership in a conspiracy which had as its alleged objects the violation of three federal criminal statutes. Two of the alleged objects, the willful misapplication of bank funds (18 U.S.C. § 656) and the knowing making of false entries in the books of the bank (18 U.S.C. § 1005) can be committed only by a bank officer or employee, although an individual who is not affiliated with a bank may be held liable as an aider and abettor or as a conspirator in their commission. *United States* v. *Tornabene,* 222 F.2d 875, 877 (3d Cir. 1955); *United States* v. *Cades,* 495 F.2d 1166, 1170 (3d Cir. 1974). To prove that an individual not affiliated with the bank is guilty as an aider and abettor, the government must prove that a bank officer committed the substantive offense and that the defendant knew of his fraudulent intent and joined with him. *United States* v. *Cades,* 495 F.2d 1166, 1168, 1170 (3d Cir. 1974). The third object of the conspiracy with which petitioner was charged was submitting false statements to a bank in order to influence its action; petitioner does not here dispute that the government established *prima facie* that he agreed with Ness to submit false statements to the bank in order to permit Ness to obtain the proceeds of a loan.

The decisions of this Court make clear that " '[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.' " *Ingram* v. *United States,* 360 U.S. 672, 678 (1959). *See United States* v. *Feola,* ..... U.S. ....., 95 S.Ct. 1255, 1265 (1975). To support a finding of intent, the Court has insisted that there be evidence of knowledge, and that that evidence of knowledge be "clear, not equivocal." *Direct Sales Co.* v. *United States,* 319 U.S. 703, 711 (1943). The Court has also said that in the case of inherently broad schemes in which many individuals are involved, a conviction may be had "of

those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others." *Blumenthal* v. *United States,* 332 U.S. 539, 556-557 (1947).

The Court of Appeals, in adopting a reasonable foreseeability standard, attributed the test to *United States* v. *Greer,* 467 F.2d 1064 (7th Cir. 1972), *cert. denied,* 410 U.S. 929 (1973), a case in which a defendant was held liable for a three-object conspiracy to (1) steal from an interstate shipment of copper; (2) transport the copper in interstate commerce and (3) conceal the stolen cargo, on the basis of evidence that he had called friends in Chicago, alerted them to the location of a disabled trailer containing copper on an Indiana highway and had twice later called them to ask about his share of the proceeds. Against his contention on appeal that he had been shown to have conspired only to steal the load, the Court held he was liable for the whole conspiracy. The Court spoke in objective terms, extending his liability to all objects of the conspiracy alleged that were "indispensable" to the success of that part of the venture with which he was immediately concerned. (467 F.2d at 1071.)

In applying the *Greer* test to the case at bar, the Court of Appeals significantly altered its meaning. In *Greer,* it was virtually beyond controversy—and the court so found— that the transportation and concealment of the copper were indispensable aspects of its successful theft. The Court did not have to look to the facts of record to know that disposition of the goods follows a theft. It was that knowledge that the Court assumed Greer had; to the extent the Court spoke of inferring consent and assuming knowledge it was in reality making the only inference that was rationally possible, given the nature of the offenses. This Court in *Blumenthal* made a similar inference. (332 U.S. at 550.)

The Seventh Circuit in the instant case, however, applied *Greer's* language to a situation in which the crime it found to be foreseeable, Johnson's willful misapplication of bank funds, was in no sense a necessary concomitant of the submission of false loan documents. The trial court in the case at bar so found in acquitting petitioner of the accessory counts (App. B, p. 16):

> "Unquestionably a loan could be fraudulently obtained by Ness without complicity on the part of a bank officer or employee: because a fraudulent loan was obtained, it does not necessarily follow that a bank officer wilfully misapplied funds or unlawfully made false entries in bank records.

The Third Circuit in a recent decision reversed a defendant's convictions of aiding and abetting a bank officer and conspiring with him to misapply funds, finding that despite the bank officer's fraudulent intent and the customer's fraudulent activities which facilitated the bank officer's misapplications, there was no evidence to show that the customer knew of the bank officer's criminal intent. *United States* v. *Cades,* 495 F.2d 1166, 1168-1169 (3d Cir. 1974).

The objects of this alleged conspiracy are separate and distinct. The agreement charged depends for its definition and essential scope on its inner-bank dimension. The application of a reasonable foreseeability standard to an object so critical to the nature of the agreement directly conflicts with the holdings of this Court that knowledge of a conspiracy and intent to join it must be proven, and that the proof must be clear, not equivocal. Only by a conscien-

tious insistence on proof of knowledge can liability in conspiracy be controlled. Without strict scrutiny of whether knowledge has truly been proven, conspiracy will indeed, as it has here, become "a dragnet to draw in all substantive crimes." *Direct Sales Co.* v. *United States, supra* at 711.*

2. The "Reasonably Foreseeable" Test, As Applied In This Case by The Court of Appeals for The Seventh Circuit As The Measure of An Individual's Liability for Conspiracy, Sanctions The Withdrawal of The Vital Factual Issue of Knowledge from The Jury.

The District Court instructed the jury that they could find petitioner guilty of the single conspiracy alleged if they found that he was knowingly and willfully a member of a conspiracy to commit *any one* of the three offenses charged as its objectives. The jury was further instructed that if they found that a conspiracy existed and that the defendant was one of its members, the conspirator attribution rules applied to any acts and declarations of other members of the conspiracy done in furtherance of its *objectives.* (App. C, pp. 19, 21.) These instructions literally mean

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* In its discussion of the evidence, the Court of Appeals made two misstatements. First, there is no evidence of record that petitioner knew that Ness was insolvent; he was asked what his financial condition was at the time, not whether Braverman was aware of it. (Tr. 102.) (The government's theory of Braverman's motive was that Ness appeared to him to be an active, successful commodities trader and Braverman desired to win his favor and his business.) It is also not correct that petitioner knew the loan would be granted prior to the submission of the financial statement petitioner signed. While the loan proceeds were in fact disbursed to Ness prior to the time Ness submitted the statement, petitioner signed it *prior* to the time the loan was granted, *after* Ness told him he wanted it to obtain the loan. (Tr. 126-129.)

that guilt of the three-object conspiracy alleged can be predicated on a finding that petitioner and Ness conspired to submit false statements to influence the bank. The "in furtherance" limitation to the co-conspirator hearsay rule here extends by its own terms to all the objectives of the alleged conspiracy. No instruction directing the jury's attention to the scope of any conspiracy they found petitioner to have joined was given.

This Court need not look to the evidence to see that petitioner's knowledge of the bank officers' criminal complicity was very much at issue in this case; the trial court's decision to set aside the jury's verdict on the accessory counts for lack of an adequate showing of knowledge and intent makes that apparent. Further, there is nothing in the nature of a plan to submit false statements to a bank which suggests bank official involvement. *See United States* v. *Cades,* 495 F.2d 1166, 1170 (3d Cir. 1974). On the record, Ness' uncontradicted testimony of the absence of contact between petitioner and the bank officials, and Ness' failure to testify to any statements he made to petitioner indicating criminal conduct by anyone at the bank at the very least raises a jury question as to petitioner's knowledge of bank official complicity.

Before the decision in the instant case, it had been the rule in the Seventh Circuit that whenever there was a possibility of a variance between an alleged multi-object conspiracy and the proven scope of an individual defendant's agreement, the scope issue had to be submitted to the jury. *United States* v. *Varelli,* 407 F.2d 735, 746 (7th Cir. 1969). *See also Kotteakos* v. *United States,* 328 U.S. 750, 769-770 (1946). In its opinion below, the Court of Appeals limited this rule, holding that it did not apply to this case because the possibility of a variance was not a "reasonable possibility." (App. A, p. 9 and n.4.)

The Seventh Circuit's failure to recognize the difference between the transactionally-related objectives of the conspiracy alleged in *United States* v. *Greer** and the distinct crimes charged as conspiratorial objectives here caused it to fail to require for conviction proof that petitioner had actual knowledge of an inside bank conspiracy. Failing to recognize the importance of that knowledge or its lack in determining the nature of any agreement petitioner made, the Court found it unnecessary to alert the jury to the issue of the scope of petitioner's agreement if they found one, and to instruct them on how to apply the co-conspirator attribution rules if petitioner's agreement did not encompass bank officers' crimes.

Petitioner's knowledge of the alleged conspiracy was very much at issue in this trial. It was an issue of fact and susceptible of proof, if proof existed. The trial court's failure to instruct the jury either that they must find that petitioner entered into an agreement encompassing all three alleged objects or that they must determine the scope of any conspiracy they find he joined vitiated his right to trial by a jury adequately instructed as to all the issues. *See Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 410-411 (1947.) The Court of Appeals' holding that its finding of foreseeability so conclusively foreclosed the issue of actual knowledge as to leave not even a jury question makes clear that the Seventh Circuit, in disregard of the warnings of *Direct Sales, supra,* has dispensed with the elements of actual knowledge and intent in multi-object conspiracy trials.

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* See the discussion at pp. 12-13, *supra.*

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION BY JUDGE PELL

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

June 16, 1975

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior Circuit Judge*

No. 74-1467

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CHARLES BRAVERMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

* Senior District Judge William J. Campbell of the Northern District of Illinois sitting by designation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this court filed this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1467

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CHARLES BRAVERMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 CR 766
Richard W. McLaren, Judge.

Argued November 7, 1974—Decided June 16, 1975

Before CUMMINGS and PELL, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

PELL, *Circuit Judge.* The defendant-appellant Charles Braverman was charged in a six-count indictment with conspiracy and five substantive counts arising from the procurement of two fraudulent loans. After a jury found Braverman guilty on all six counts, the district court judge, who had reserved ruling on Braverman's motion

*Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

for judgment of acquittal, found that the Government had failed to prove four accessory counts (Counts 2 through 5) and granted Braverman's motion on these counts. Braverman now appeals from his conviction on the remaining Counts 1 and 6, which charged, respectively, conspiracy and making false statements to a bank in order to obtain two loans, in violation of 18 U.S.C. § 1014. The major issues raised on appeal are: (1) whether the evidence was sufficient to prove Braverman intended to defraud the bank; (2) whether the evidence was sufficient to prove Braverman's involvement in the conspiracy; (3) whether the district court erred in deferring its ruling on Braverman's motion for judgment of acquittal; (4) whether the evidence was sufficient to show the materiality of the financial statement; and (5) whether the district judge erred in replaying the tape of the jury instructions and permitting the jury to take notes during this time.

1. Braverman contends with respect to both Counts 1 and 6, that the evidence was insufficient to prove that he intended to defraud the Steel City National Bank.

The intent of the defendant, in a case such as this, may, of course, be inferred from the facts and circumstances in proof. *United States* v. *Acree,* 466 F.2d 1114, 1117 (10th Cir. 1972), *cert. denied,* 410 U.S. 913 (1973). Viewing the evidence here, as we must, in the light most favorable to the Government, we find that the evidence was more than sufficient to support the jury's verdict.

Braverman, a broker on the Chicago Mercantile Exchange, agreed to use a fictitious name, "Peter Weis," to secure a $30,000 bank loan for his insolvent friend Robert Ness. After being assured by Ness that Ness could "han-

dle" such a loan at the bank, Braverman signed a blank bank note with the fictitious name, see *United States* v. *Iannelli,* 461 F.2d 483 (2d Cir. 1972), *cert. denied,* 409 U.S. 980, and arranged for a mailing address where bank notices could be mailed.

The conditions under which the loan was granted, moreover, were highly unusual. A few days after Braverman had signed the blank note but before any financial statement was filed with the bank, Ness told Braverman that he could expect loan approval in a day. Later when Braverman and Ness did "get together" to prepare a financial statement, Braverman simply signed the blank statement with the fictitious name and left it to the insolvent Ness to fill in the financial data.[1] At no time did Braverman provide Ness with any information concerning his actual financial situation.

Later, when the note became due, it was renewed by using renewal notes signed by Braverman in the fictitious name.

Furthermore, when difficulties arose with regard to the false address given for Peter Weis, Braverman arranged for a second false address, that of his nephew.[2] When questioned by his nephew about the bank correspondence, Braverman simply told him to "throw it out."

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[1] The loan was, in fact, granted after Braverman had signed the financial statement but before it was submitted to the bank.

[2] On two separate occasions, note-due notices were returned to the bank, once because of "No Such Address" and once because the property had been sold. These red flags to a lending institution appear not to have rippled the waters.

The evidence also indicated that although Braverman originally refused to secure a second "Peter Weis" loan for Ness, funds from that $20,000 loan, once secured by Ness, were used to place a particular commodities account in a credit position. Braverman's handling of this account had generated over $3,500 in commissions for him until a deficit position forced a halt to the trading. Once restored to a credit position, the account generated a further $5,500 in commissions for Braverman. Moreover, the evidence indicated that at some point Braverman signed the fictitious name to a second blank financial statement which Ness completed and submitted to the bank.

The fact that Braverman was willing to repay the loans and did in fact do so does not negate his intent to defraud. *United States* v. *Acree, supra* at 1118; *United States* v. *Fortunato,* 402 F.2d 79, 80-81 (2d Cir. 1968), *cert. denied,* 394 U.S. 933 (1969).

The question of Braverman's intent was a matter for the jury to decide. The jury was aware of Braverman's illness during the pertinent period as well as the defendant's contention that he had merely been duped by Ness. However, given the facts outlined above, we cannot say that the evidence was insufficient to support the jury's verdict.

2. Count 1 charged a conspiracy involving Braverman, Ness, and two officers of the Steel City National Bank, Stanley Johnson and Charles Helms. The conspiracy, as charged, had three objectives: (1) the willful misapplication of bank funds, (2) the making of false entries in bank records, and (3) the submission of false statements to the bank. The defendant argues that the evidence was insufficient to prove Braverman's involvement in the first two objectives of the conspiracy. Braverman contends

that the only conspiracy with which he could have been charged is one whose sole object was to submit false statements and whose sole participants were Ness and himself.

As Braverman concedes, his acquittal on the accessory counts dealing with the willful misapplication of funds and the making of false entries did not preclude a finding that Braverman was liable under a conspiracy count extending to these activities. *United States* v. *Greer,* 467 F.2d 1064 (7th Cir. 1972), *cert. denied,* 410 U.S. 929 (1973). Moreover, the fact that the Government presented no evidence indicating that Braverman ever met Johnson or Helms is not determinative of Braverman's involvement in the conspiracy since a conspirator need not know the identity or even the number of his confederates. *Blumenthal* v. *United States,* 332 U.S. 539 (1947).

"The fundamental question is what the defendant assented to and whether that assent can be construed as including subsequent participants and activities." *Greer, supra* at 1071. In *Greer,* the defendant simply informed four persons of the location in Indiana of a truckload of copper. On the basis of this information, the four stole the copper, transported it to Chicago, warehoused it, and ultimately sold a portion of it. Greer's involvement was limited to informing the others of the location of the truck and to telephoning later to ask about his share of the proceeds. This court held that although the evidence was insufficient to prove that Greer aided and abetted the transportation of the goods, the evidence was, nonetheless, sufficient to support a conspiracy count charging three objectives: stealing from an interstate shipment, transporting stolen goods in interstate commerce, and concealing stolen goods.

> "[A] conspiracy with multiple objects and multiple parties can . . . be held to constitute a single conspiracy as long as the objects are integrally related, such that 'the success of that part with which [the defendant] was immediately concerned, was dependent upon the success of the whole.' . . . [E]ach 'link' in the scheme must have assumed that the unlawful venture could not stop with their task alone. Thus we infer consent to the later, indispensable stages from Greer's consent to the preliminary ones." 467 F.2d at 1071.

Just as Greer could reasonably foresee that the stolen copper would be transported in interstate commerce and concealed, so, in the present case, Braverman could reasonably foresee the necessity of the criminal involvement of bank officials. Braverman applied for a loan in a false name and provided a false address after being assured that Ness could "handle" such a loan at the Steel City National Bank.[3] Braverman was told by Ness to expect approval of the loan even before a financial statement had been submitted. Braverman later signed a blank financial

[3] Words, of course, must be viewed in the context in which they are used. No doubt a prospective borrower whose credit was established at a bank could be deemed to be handling a loan at the bank, even though that loan was routine and legitimate, although in this circumstance it might seem more appropriate to say that the bank was handling the loan. In the present situation, in which the financial statement was signed with a fictitious name without knowledge of what was to be inserted on the form, "handle" would reasonably appear to imply something more than the ordinary legitimate bank loan transaction and rather to carry the indication that notwithstanding any lack of authenticity in the transaction the loan nevertheless could be arranged at a particular bank by virtue of intra-bank cooperation, which, under the present circumstances, would necessarily be of an illegal nature.

statement with the fictitious name but without supplying Ness with any information concerning his actual finances. Braverman assured his nephew he could simply throw out the bank correspondence addressed to Peter Weis. Yet equipped initially with only the blank note signed in a false name and a false address, and later supplemented with a signed blank financial statement, an insolvent Ness sought to and did secure a $30,000 loan. As in *Greer*, Braverman participated in "setting up a structure which [became] the continuing focal point for crimes" and "must have assumed that the unlawful venture could not stop with [his] task alone." *Id.*

It is no sufficient answer to the contrary to say that Braverman could properly assume that Ness would so doctor the papers supporting this loan at a national bank that the loan officers would be fooled into thinking that these were indeed legitimate lending transactions. The handling of the transactions was so bizarre, the concealment of the truth was so evident, and the badges of fraud were so obvious that we are unable to preclude the drawing of a reasonable inference that Braverman was not ignorant of the necessity of bank inside complicity. He need not have foreseen the exact form of that complicity nor the identity of those involved.

Since the indictment charged and the proof showed a single continuing and continuous conspiracy, the "possibility of a variance" *United States* v. *Varelli*, 407 F.2d 735, 746 (7th Cir. 1969), did not exist and, therefore, a multiple conspiracy instruction was not necessary.[4] *United*

[4] We read *Varelli's* "possibility" as meaning something more than a scintilla, and requiring a reasonable possibility of variance. Here the conspiracy by its nature required for its accomplishment the participation of bank officials.

States v. *Barrera,* 486 F.2d 333, 339 (2d Cir. 1973); *United States* v. *Calabro,* 449 F.2d 885, 893 (2d Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972).

3. Braverman next complains that the district court erred in deferring his ruling on the defense motion for acquittal until after the jury returned its verdict.

While the better practice would have been to have entered the judgment of acquittal at the close of the Government's case-in-chief, the error is harmless since, when the Government rested, the evidence was sufficient to sustain a conviction on Counts 1 and 6. *United States* v. *Guinn,* 454 F.2d 29, 33 (5th Cir. 1972), *cert. denied,* 407 U.S. 911; *United States* v. *Prionas,* 438 F.2d 1049, 1054 (8th Cir. 1971), *cert. denied,* 402 U.S. 977. Moreover, because Count 1 charged Braverman with conspiring to commit the same acts alleged in the accessory counts, all of the evidence supportive of the accessory counts would have been admissible had Braverman been tried only on Counts 1 and 6. *United States* v. *Wininger,* 427 F.2d 1128, 1129 (6th Cir. 1970).

We find unpersuasive Braverman's contention that the jury's erroneous finding of guilt on the accessory counts "must necessarily have infected the jury's deliberations on the conspiracy count." Acquittal on an accessory count does not bar a conviction on a conspiracy count based on the same facts. See *Greer, supra.* Furthermore, the jury in the present case was twice instructed that each count should be separately considered and that "[t]he defendant's guilt or innocence of the crime charged in one count should not affect your verdict on any other count." See *United States* v. *Pacente,* 503 F.2d 543, 548 (7th Cir. 1974).

4. Braverman contends, with respect to Count 6, that the evidence was insufficient to show the materiality of the financial statement.

A statement concerns a material fact when it has the "capacity to influence" the lending institution. *United States* v. *Goberman,* 458 F.2d 226, 229 (3d Cir. 1972). See also *Blake* v. *United States,* 323 F.2d 245 (8th Cir. 1963). Here, the false financial statement clearly had the capacity to influence the bank officials. The fact that Johnson granted the loan before the statement was submitted is irrelevant since, as the defendant concedes, materiality does not depend upon actual reliance. *Goberman, supra.* Although the loan was granted before the statement was submitted, Johnson granted the loan with the knowledge and assurance that the statement would be forthcoming. Braverman, moreover, cannot avoid criminal liability on the basis of Johnson's illegal conduct. "The words 'for the purpose of influencing' were included in the statute to define the quality of the required intent, not to immunize a party from criminal liability because an officer of the bank was involved in the fraudulent scheme." *United States* v. *Niro,* 338 F.2d 439, 441 (2d Cir. 1964). Finnally, we note that, subsequent to the submission of the financial statement, the loan was repeatedly renewed, transactions which the statement clearly had the capacity to influence. It is common knowledge that not only do loan files have to meet bank imposed standards but such files are subject to periodic scrutiny by national bank examiners as to supporting documents and other pertinent data.

5. We also find unpersuasive Braverman's contention that the district judge erred in responding to a jury inquiry by having a tape of the entire set of instructions played and in allowing the jury to take notes while the tape was played.

The necessity, extent, and character of any supplemental instructions to the jury are matters within the discretion of the district court. *United States* v. *Jackson,* 482 F.2d 1167, 1177 (10th Cir. 1973), *cert. denied,* 414 U.S. 1159

(1974). Since the instructions in the present case properly stated the law of aiding and abetting, the district court did not abuse its discretion by having the instruction replayed for the jury. *United States* v. *Wilkerson,* 456 F.2d 57, 62 (6th Cir. 1972), *cert. denied,* 408 U.S. 926. The jury's inquiry, moreover, related only to the accessory counts on which the district judge later granted the defense motion for acquittal. *United States* v. *Harris,* 388 F.2d 373 (7th Cir. 1967), and *Powell* v. *United States,* 347 F.2d 156 (9th Cir. 1965), do not support Braverman's contention. In *Harris,* the district judge, in rereading the instructions, omitted all definitions of essential terms and made no reference to the presumption of innocence and standard of proof required for conviction. In *Powell,* the trial court reread only part of the instructions which might have led to an improper standard of review.

The decision to allow a jury to take notes as well as the procedure used for such note-taking are also matters within the sound discretion of the district court. *United States* v. *Marquez,* 449 F.2d 89, 93 (2d Cir. 1971), *cert. denied,* 405 U.S. 963 (1972); *United States* v. *Pollack,* 433 F.2d 967 (5th Cir. 1970). We find no abuse of discretion here. Since the jury here requested that they be permitted to make notes during the playing of the tape, the defendant's reliance on *United States* v. *Standard Oil Co.,* 316 F.2d 884 (7th Cir. 1963), is inapposite.

We have considered the other issues raised by the appellant but find them to be without merit.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 16, 1975.

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLAM J. CAMPBELL, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-appellee,

No. 74-1467 vs.

CHARLES BRAVERMAN,
Defendant-appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 Cr 766
Richard W. McLaren, Judge.

On consideration of the petition for rehearing *en banc,* or in the alternative that it be reheard by the original panel, filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the petition, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

NOTE: Judge Philip W. Tone, Circuit Judge, has disqualified himself from any consideration of the petition for rehearing *en banc* in this matter.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

CHARLES BRAVERMAN

No. 73 CR 766

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendant's post-trial motions following his conviction by a jury on six counts arising out of allegedly illegal bank loans. The motions are granted in part and denied in part.

The indictment contained six counts. Count I alleged that defendant Braverman conspired with Stanley Johnson, Charles Helm and Robert Ness to commit or to aid and abet in the commission of three illegal objects: (1) the willful misapplication of funds of the Steel City National Bank; (2) the making of false entries in the books, reports and statements of the said bank; and (3) the knowing making of false statements and reports reflecting non-existent and overvalued assets for the purpose of influencing the actions of the Steel City National Bank.

Counts II and III charged Braverman with aiding and abetting Stanley Johnson in the willful misapplication of funds belonging to the Steel City National Bank in violation of 18 U.S.C. §§2 and 656. Counts IV and V charged

Braverman with aiding and abetting Johnson in the making of false entries in the bank's interview and Memorandum sheets for two different loans in violation of 18 U.S.C. §§2 and 1005. At the time the offenses allegedly were committed Stanley Johnson was an officer and employee of the Steel City National Bank.

Count VI charged that Braverman did knowingly and willfully make and cause to be made false statements of material facts in a personal statement submitted to the Steel City National Bank in order to obtain two loans in the amount of $30,000 and $20,000, respectively.

The defendant has moved for judgment of acquittal n.o.v. or, in the alternative, for a new trial. Upon a motion for judgment of acquittal the evidence must be taken in the light most favorable to the government, and if there is substantial evidence tending to show that the defendant is guilty beyond a reasonable doubt, the motion must be denied and judgment entered on the jury's verdict. *United States* v. *Yeoman-Henderson, Inc.*, 193 F.2d 867, 869 (7th Cir. 1952).

As to Counts II through V the motion for judgment of acquittal is granted. Braverman was charged as an aider and abettor in those counts, since he is not a bank officer or employee and 18 U.S.C. §§656 and 1005 by their terms do not make non-bank employees liable as principals in their individual capacities. The evidence established that Robert Ness, a lawyer and personal friend, approached Braverman in order to borrow money. After having refused to loan his own funds, Braverman eventually agreed to assist Ness in obtaining a bank loan under a fictitious name. Braverman signed some notes and personal financial statement forms in blank and provided addresses to which bank statements would be mailed.

Unquestionably a loan could be fraudulently obtained by Ness without complicity on the part of a bank officer or employee: because a fraudulent loan was obtained, it does not necessarily follow that a bank officer wilfully misapplied funds or unlawfully made false entries in bank records. In light of this, in order to convict Braverman on Counts II through V there must be evidence that he had the specific intent to aid in, or specific knowledge of, the crimes with which Johnson was charged. See *United States* v. *Greer,* 467 F.2d 1064, 1069 (7th Cir. 1972), *cert. denied,* 410 U.S. 929 (1973). Taking the evidence in the light most favorable to the government there was not substantial evidence from which the jury could conclude beyond a reasonable doubt that Braverman had the specific intent to aid Johnson or specific knowledge of the crimes with which Johnson was charged.

Following oral argument on the motion for judgment of acquittal on Counts II through V, defendant submitted a supplemental brief in support of his motions with respect to Counts I and VI. The motions rest primarily on the contention that the government proved more than one conspiracy, if any, whereas Count I alleges the existence of a single conspiracy having three objects. The resulting variance is purportedly fatal. Furthermore, it is contended that in light of the proof of multiple conspiracies, the jury was not adequately instructed on the co-conspirator hearsay rule and the jury's verdict may have been based upon one of the unproven alternatives on which it was instructed that it could base a finding of guilty on Count I.

The fact that the government failed to prove that Braverman had the specific intent to aid Johnson or had specific knowledge of Johnson's criminal conduct does not mean

a fortiori that he cannot be found guilty of a conspiracy encompassing Johnson's conduct. *Cf. Greer, supra.* In that case, Greer simply notified others of the existence in Indiana of a truckload of copper. The copper was stolen by the other persons and transported from Indiana to Chicago. Greer and six others were charged with conspiring to steal from an interstate shipment; transportation of stolen cargo in interstate commerce; and concealing the stolen cargo. Greer was also charged with the substantive crime of transporting the copper in interstate commerce. Greer's conviction on the substantive count was reversed since the government failed to prove that he intended to aid in post-theft plans or that he knew of the thieves' travel plans.

In spite of this absence of proof on the substantive charge, Greer's conspiracy conviction was upheld, with the Seventh Circuit rejecting his contention that multiple conspiracies were proven. It was stated at 1071 that a conspiracy with multiple objects and multiple parties can constitute a single conspiracy if the objects are so integrally related that the success of defendant's role is dependent on the success of the whole. The court went on to note that

> "[c]onspiracy, it is suggested, is more than a species of inchoate crime; conspirators are held liable for setting up a structure which becomes the continuing focal point for crimes. . . . Hence, we may infer agreement to transport and dispose of the copper from complicity in a structure that readily led to that end where we do not infer intent to commit the same substantive offenses. . . ."

In light of the *Greer* decision, Braverman's acquiescence and cooperation in obtaining a loan in the name of a fictitious person, his considerable business experience, his

use of the proceeds of one of the unlawful loans, and the acts taken to obtain the loan from the Steel City National Bank, there is substantial evidence tending to support the existence of a single conspiracy. There is, of course, no question of the falsity of the loan papers defendant knowingly signed and, accordingly, no question that his conviction under Count VI must stand.

The defendant's motions for acquittal and a new trial on Counts I and VI are therefore denied.

IT IS SO ORDERED.

ENTERED:

/s/ *R. W. McLaren*
United States District Judge

DATED: May 31, 1974

APPENDIX C

The Charge Relating To Conspiracy and Aiding and Abetting (Tr. 755-770)

I come now to the second part of the instructions, the specific charges in this indictment, and the standards by which you are to judge them.

In Count I of the indictment the various named defendants were indicted for the crime of conspiracy (a) to wilfully misapply and cause to be misapplied monies, funds and credits of Steel City National Bank through transactions of that bank with intent to defraud that bank and to aid, abet, counsel, induct and procure the commission of the aforementioned offenses, all in violation of United States law. (b) To make and cause to be made false entries in the books, reports and statements of the said bank with intent to defraud the bank, and further, with intent to deceive and defraud the board of directors of the Steel City Bank and the Controller of the Currency, and to aid, abet, counsel, induce and procure the commission of the aforementioned offenses in violation of federal law. (c) To knowingly make false statements and reports reflecting non-existent and overvalued assets for the purpose of influencing the actions of the Steel City Bank, and to aid, abet, counsel, induce and procure the commission of the aforementioned offenses, all in violation of Title 18, U.S. Code, Sections 2 and 1014.

To convict the defendant Braverman of this offense, the government must prove beyond a reasonable doubt, first, the existence of a conspiracy to commit any one of these offenses; second, that defendant Braverman was knowingly and wilfully a member of the conspiracy; and, third,

that during its existence at least one overt act was committed by one or more of its members in furtherance of the objectives of the conspiracy.

It is the conspiracy to commit the offense I have stated which is the crime charged and it may be established regardless of whether the purposes of the conspiracy were accomplished or whether the substantive crimes were actually committed.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose or a lawful purpose by unlawful means. While it involves an agreement to violate the law, it is not necessary that the persons charged met together and entered into an express or formal agreement or that they stated in words or writing what the scheme was or how it was to be effected; it is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful act. Such an agreement may be inferred from the circumstances and the conduct of the parties since ordinarily a conspiracy is characterized by secrecy.

In determining whether a conspiracy existed, the jury should consider the acts and declarations of all of the alleged participants. However, in determining whether this particular defendant, Charles Braverman, was a member of a conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants unless and until it is established that a conspiracy existed and that he was one of its members.

To be a member of the conspiracy, a defendant need not know all of the other members nor all of the details of the conspiracy nor the means by which the objects were to be accomplished. Each member of the conspiracy may perform separate and distinct acts.

It is necessary, however, that the government prove beyond a reasonable doubt that a defendant was aware of the common purpose and was a willing participant with the intent to advance the purpose of the conspiracy.

The extent of a defendant's participation is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he plays a minor part in a conspiracy. His financial stake, if any, in the venture is a factor to be considered in determining whether a conspiracy existed and whether a defendant was a member of it.

If it is established beyond a reasonable doubt that a conspiracy existed and that the defendant was one of its members, then the acts and declarations of any other member of such a conspiracy in or out of the defendant's presence done in furtherance of the objectives of the conspiracy and during its existence may be considered as evidence against such defendant.

When persons enter into an agreement for an unlawful purpose, they become agents for one another. However, statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination may be considered as evidence only against the person making those statements.

The following overt acts are alleged in the indictment:

1. That in or about April of 1971, Robert Ness and Charles Braverman had a conversation at Chicago, Illinois.

2. On or about April 1, 1971, Robert Ness and Charles Braverman prepared and Charles Braverman signed a personal statement with the name of Peter Weis containing false statements as to the said Peter Weis' assets, income and position.

(Reading balance of overt acts.)

The Grand Jury realleges and incorporates by reference the allegations found in Counts 2 through 5 of the indictment and these are the substantive counts which I will get to in a moment, and they are alleged as separate and distinct overt acts, and this is said all to be in violation of Title 18, United State Code, Section 371.

It is not necessary that all of the overt acts charged in the indictment were performed. One overt act is sufficient.

An overt act, incidentally, means any act committed by one or more of the conspirators to accomplish a purpose of the conspiracy. It need not be in violation of the law and the other conspirators need not join in it or even know about it. It is necessary only that such act be in furtherance of the purpose of objects of the conspiracy.

If the jury finds beyond a reasonable doubt that a conspiracy existed as charged in the indictment and that during the existence of the conspiracy one of the overt acts allegedly was knowingly done by one or more of the conspirators and in furtherance of some object of the conspiracy, proof of the conspiracy offense is then complete. It is complete as to each defendant found by the jury beyond a reasonable doubt to have been knowingly and wilfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators committed the overt act.

Incidentally, I used the term "wilfully" a number of times. Let me define it for you. An act is done wilfully if done voluntarily and intentionally and with the specific intent to do something the law forbids, that is to say, with bad purpose, either to disobey or to disregard the law.

We move now to Counts 2 through 5. The defendant Charles Braverman is charged in Counts 2 through 5 with aiding and abetting Stanley Johnson in certain violations

of federal law. This is said to be in violation of Title 18, United States Code, Section 2. This Section provides that "whoever aids, abets, counsels, commands, induces or procures the commission of a crime is punishable as a principal."

In order to aid or abet the commission of a crime, a person must associate himself with the criminal venture, participate in it and try to make it succeed.

Count 2 of the indictment charges that on or about

• • •

It is further alleged in this Count 2 that the defendant Charles Braverman, knowing the foregoing, did wilfully aid and abet such offense by Stanley Johnson.

Count 3 of the indictment charges that on or about December

• • •

—and that defendant Charles Braverman, knowing the foregoing, did wilfully aid and abet such offense by Stanley Johnson.

Now Title 18, United States Code, Section 656, which Stanley Johnson is alleged to have violated, provides in part:

> "Whoever, being an officer or employee of or connected in any capacity with any national bank or a bank, the deposits of which are insured by the F.D.I.C., wilfully misapplies any of the monies, funds, or credits of such bank, shall be guilty of an offense against the laws of the United States."

I have used the word "misapplication." Let me define it. A misapplication means an obviously improper and unjustifiable use of the funds of a national bank done with intent to injure and defraud the bank and includes a payment made for a fictitious purpose or a payment the true purpose of which is concealed from the bank.

There can be a misapplication of the funds of a national bank even though the bank does not suffer an actual loss. The fact that the defendant made restitution to Steel City National Bank is not a defense to charges contained in the indictment, but it may be considered in determining whether or not the defendant had the requisite intent to defraud required under the statutes.

Now three essential elements are required to be proved beyond a reasonable doubt in order to establish the offense of aiding and abetting with which Charles Braverman is charged in Counts 2 and 3 of the indictment: First, that there was a wilful misapplication of money or funds by Stanley Johnson in the manner charged in Counts 2 and 3 of the indictment. Second, that Charles Braverman, knowing the foregoing, did aid and abet Stanley Johnson to misapply those monies or funds. And, third, that Charles Braverman did such act or acts knowingly and wilfully.

To move on to Count 4, Count 4 of the indictment charges:

• • •

—and that defendant Charles Braverman, knowing the foregoing, did wilfully aid and abet such offense by Stanley Johnson.

Count 5 of the indictment charges:

On or about December 17

• • •

—and that defendant Charles Braverman, knowing the foregoing, did wilfully aid and abet such offense by Stanley Johnson.

All right. Title 18, U. S. Code, Section 1005 which Stanley Johnson is alleged in these two counts to have violated provides in part:

> "Whoever makes any false entry in any book, report or statement in any national bank or a bank, the deposits of which are insured by the F.D.I.C., with intent to injure or defraud such bank, shall be guilty of a violation of this section."

This is the crime with which Stanley Johnson is charged in Counts 4 and 5.

I instruct you that as a matter of law, Government's Exhibit 17 entitled "Interview and Memorandum Sheet" is a book, report or statement within the meaning of the statute.

Again three essential elements are required to be proved beyond a reasonable doubt in order to establish the offense of aiding and abetting with which Charles Braverman is charged in each of Counts 4 and 5 of the indictment: First, that there was a false entry made by Stanley Johnson in a book, report or statement of a national bank. Second, the making of the entry by Johnson was done with intent to injure or defraud the bank. And third, that the defendant Braverman, knowing the foreging, did wilfully aid and abet such false entry to be made.

I used the word "false" a number of times. Let me define that for you. A statement, including a statement, a claim or a document, is false if it was untrue when made and was then known to be untrue by the person making it or causing it to be made.

I have used the phrase "intent to defraud." Let me define that for you. The phrase "intent to defraud" used in the crime charged means that the act was done knowingly, with the specific purpose to deceive, in order to cause financial loss to another or financial gain to one's self or another.

In order to find Charles Braverman guilty of aiding and abetting the commission of the wilful misapplication of Steel City National Bank funds or the making of false entries in the books of the Steel City National Bank, you must first find beyond a reasonable doubt that Stanley Johnson committed those crimes. It is immaterial that Stanley Johnson is not on trial at the present time.

If you are not convinced beyond a reasonable doubt of the guilt of Stanley Johnson, you must find Charles Braverman not guilty under Counts 2, 3, 4 and 5.

No. 75-244

Supreme Court, U. S.
FILED
NOV 5 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES BRAVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-244

CHARLES BRAVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erroneously applied a test of "reasonable foreseeability" of criminal involvement by bank officials in upholding his conviction of conspiring to misapply bank funds, and that the trial court erred in not giving a multiple conspiracy instruction.

After trial in the United States District Court for the Northern District of Illinois, petitioner was found guilty by a jury of conspiring, in violation of

18 U.S.C. 371, to violate 18 U.S.C. 656 (willful misapplication of bank funds), and of five related substantive offenses. The court, however, granted petitioner's motion for acquittal of the substantive counts, except for count 6, submission of a false statement to a bank to influence its actions, in violation of 18 U.S.C. 1014. Petitioner was fined $1,000 each on the conspiracy count and the substantive count. The court of appeals affirmed (Pet. App. A, pp. 3-12).

The evidence at trial showed that petitioner, his friend Robert Ness, and two officers of a Chicago bank, Stanley Johnson and Charles Helm, participated in a scheme to procure bank funds for Ness in violation of authorized bank procedures.[1] Petitioner was a broker on the Chicago Merchantile Exchange. Ness, who was engaged in commodities trading and was insolvent, asked petitioner for a loan, explaining that he needed $15,000 to $20,000. When petitioner was unable to comply, Ness suggested that petitioner could obtain a bank loan for Ness using a fictitious name (Tr. 108). In response to petitioner's inquiry how such a loan could be arranged, Ness replied that he "could handle such a situation at the Steel City National Bank" (Tr. 108, 403). Ness noted that if a loan was taken in a false name, a reliable mail drop would be required to insure that correspondence from the bank would not be returned (Tr. 109). Petitioner agreed to "think about" the matter, pointing out that

[1] Ness, Johnson and Helm pleaded guilty before trial to charges in other indictments and were not tried with petitioner.

in any case he "would need time to locate a friend who could receive the mail" (Tr. 109, 403). Ness left a blank promissory note from the Steel City Bank with petitioner, adding, "I'll see what I can do, whether I can arrange it, and we'll go from there" (Tr. 109).

Shortly thereafter, petitioner returned the note to Ness bearing the signature "Peter Weis" and the address of a model home owned by a friend (Tr. 110, 114). Although petitioner had signed a blank note and had not filled out a financial statement in regard to the loan, Ness told him that he could expect approval of the loan in a day (Tr. 124). Later petitioner and Ness did "get together" to prepare a financial statement; petitioner simply signing the blank statement with the fictitious name and leaving it to Ness to fill in the financial data (Tr. 128). After Ness received a $30,000 loan from the bank, he backdated the financial statement by about three weeks and submitted it to the bank.[2] When the note came due, Ness renewed it with one of several renewal notes signed by petitioner as "Peter Weis" (Tr. 149).

At about the same time, co-defendant Johnson advised Ness that bank correspondence sent to the false

[2] Ness gave the statement to co-defendant Helm and advised co-defendant Johnson that a loan file could now be compiled since Helm had the financial statement. Johnson told Ness that a memorandum stating the purpose of the loan would be needed for the file, since bank examiners were then in the bank. At Ness's suggestion, he listed as the purpose the purchase of real estate and entered false data concerning the identity of the non-existent seller (Tr. 140-143, Govt. Ex. 17).

address was being returned to the bank. Petitioner then arranged for a second false address, that of his nephew, and instructed the nephew to throw out any mail received from the Steel City Bank (Tr. 14-15).

Later, petitioner agreed to handle the commodities trading account of certain friends of Ness. During the next month, trading in the account generated commissions of more than $3,500 for petitioner, until a deficit position in the account forced a halt to the trading. Petitioner initially declined Ness's request for help in obtaining a second loan to eliminate the deficit, but Ness eventually obtained a loan of $20,000, with petitioner's knowledge, using a note previously signed by petitioner in the name of Weis (Tr. 160-163). By means of this loan, trading was resumed in the account, and the account generated additional commissions of more than $5,500 to petitioner during the next two months (Tr. 586). Near the end of this period, Ness completed and submitted to the bank another financial statement that petitioner had signed in blank using the fictitious name (Tr. 169-170).

1. Petitioner contends (Pet. 10-14) that the court of appeals erroneously affirmed his conviction by finding that it was reasonably foreseeable that bank officials, and not just Ness, would participate in the conspiracy to misapply bank funds. Petitioner argues that unless his knowledge of participation by bank officials is proved, his participation in the conspiracy to misapply bank funds has not been proved, and that the standard of proof required by this Court in con-

spiracy cases is that the evidence be "clear, not equivocal," citing *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711.

The agreement that is the essential element of a conspiracy need not be shown to have been explicit, but can be inferred from the facts and circumstances of the case. *Id.* at 711-713; *Iannelli* v. *United States*, 420 U.S. 770, 777 n. 10. Moreover, while the accused must be shown to have known "the essential nature of the plan," he need not have been aware of all its details or the participation of specific other persons. *Blumenthal* v. *United States*, 332 U.S. 539, 557. In the instant case, as the court of appeals found, the evidence negates any reasonable belief by petitioner that the scheme involved only himself and Ness, that is, that it consisted of Ness's "so doctor[ing] the papers supporting this loan * * * that the loan officers would be fooled * * *" (Pet. App. A, p. 9). To the contrary, as the court of appeals concluded (*ibid.*):

> The handling of the transactions was so bizarre, the concealment of the truth was so evident, and the badges of fraud were so obvious that we are unable to preclude the drawing of a reasonable inference that [petitioner] was not ignorant of the *necessity* of bank inside complicity. He need not have foreseen the exact form of that complicity nor the identity of those involved. [Emphasis added.]

Thus the court of appeals determined that the evidence that petitioner knew of the involvement of the bank officials was in fact "clear, not equivocal." Peti-

tioner's claim that the court applied an incorrect standard is therefore without merit.

2. Petitioner contends (Pet. 14-16) that under an instruction given the jury (Pet. App. C, p. 19) he could have been convicted of the conspiracy charged even if the jury found that he had conspired only with Ness to submit false statements to the bank and that no bank officials were involved. Therefore, as we understand petitioner's argument, he claims that he was entitled to an instruction that, if the jury found that a conspiracy of only this scope existed, it could consider only those acts and statements of co-conspirators that were in furtherance of this narrower conspiracy—*i.e.*, only statements of Ness and not those of the bank officials.

Although the court did instruct the jury that to convict petitioner it must find a conspiracy to commit "any one of" the three substantive offenses listed as objects of the conspiracy (*ibid.*), it is inaccurate to suggest that the jury was thereby permitted to convict petitioner "on a finding that [he] and Ness conspired [without the knowledge of bank officials] to submit false statements to influence the bank" (Pet. 15). The indictment charged a conspiracy between petitioner, Ness, *and* bank officials, and the instructions specifically referred to the conspiracy "as charged in the indictment" (Pet. App. C, p. 22). Moreover, as the court of appeals found, the evidence was inescapable that if petitioner was part of any conspiracy, it was one that contemplated the knowing assistance of bank officials.

But even if the court's instruction permitted the jury to convict petitioner of conspiring merely with Ness to submit false statements (a conspiracy with that objective would not require bank officer participation), petitioner was not prejudiced, for the court's further instructions adequately limited the jury's application of the "conspirator attribution rules" (Pet. 14) according to the scope of the scheme the jury found to have existed. After stating that to convict petitioner the government had to prove beyond a reasonable doubt both a conspiracy to commit "any one of these [underlying] offenses" (Pet. App. C, p. 19) and that petitioner "was aware of the common purpose and was a willing participant with the intent to advance the purpose of the conspiracy" (Pet. App. C, p. 21), the court continued (*ibid.*):

> If it is established beyond a reasonable doubt that a conspiracy existed and that the defendant was one of its members, then the acts and declarations of any other member of such a conspiracy in or out of the defendant's presence done in furtherance of the objectives of the conspiracy and during its existence may be considered as evidence against such defendant.

On the other hand, the court noted, "statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination may be considered as evidence only against the person making those statements" (*ibid.*). Thus the jury was effectively instructed to define the scope of the conspiracy, if any, and to consider only

those co-conspirator statements that were in furtherance of the objectives of the conspiracy.

Finally, if one accepts the supposition that the jury may have convicted petitioner solely of the narrow false statements conspiracy with Ness alone, it is hard to see how statements of the bank officers would have had any relevance to the question of petitioner's involvement in that conspiracy—the evidence for which was overwhelming. Petitioner has not indicated how any such declarations may have affected the jury's verdict in this respect, and thus any error would have been harmless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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